

## CHAPTER FOUR

### Legal and Institutional Analysis

#### INTRODUCTION

The vision of the WCC is to enhance transportation in the State of Washington with an integrated, multi-modal system that will facilitate the efficient movement of freight, goods, people, and utilities with greater safety and security. The WCC is proposed as a North-South corridor with connectivity to major cities that will ease the growing congestion of freight and passenger travel along Western Washington's major transportation corridor, Interstate 5, as well as to provide other important facilities, such as public utilities. The potential components of the WCC will accommodate truck and rail freight, passenger rail and vehicles, non-motorized traffic, and utilities such as power, natural gas, petroleum, and telecommunication.

Nossaman, Guthner, Knox and Elliott, LLP's assignment was to conduct a legal analysis of the institutional issues surrounding the assembly, master planning, construction, and management of the WCC. In the *Institutional Framework Alternatives Analysis* section of this chapter, we discuss our alternatives analysis of different institutional structures for the WCC and recommend use of a single purpose government agency for the development and management of the WCC. In the section entitled *Powers and Authority of a Single Purpose Government Entity*, we discuss the powers and authority to entrust to this government agency in order to ensure its effectiveness. The *Limitations on Powers and Authority* section discusses the recommended limitations on the government agency's powers and authority. In the section *Challenges to WCC Public-Private Initiatives*, we discuss the challenges of public-private partnership initiatives as they apply to the WCC. We discuss design issues in the section entitled *Design Issue Regarding Utilities*. We conclude with a summary of the key issues and our recommendations for meeting the goals of the WCC from a legal perspective.

#### INSTITUTIONAL FRAMEWORK ALTERNATIVES ANALYSIS

The institutional framework of a project significantly impacts key aspects of its development and is an important consideration for the WCC. We have screened numerous alternatives and have selected three with the greatest potential for the feasible assembly, master planning, and management of the WCC. These alternatives are a) use of an existing government agency; b) creation of a joint powers authority; and c) creation of a single purpose government agency.

## Existing Government Agency

The first alternative is to use an existing government agency, such as the Washington State Department of Transportation (WSDOT) to master plan, develop, and manage the WCC. There are several advantages to using WSDOT. As an existing government agency, WSDOT has an established organization, with the management, functions and personnel to facilitate the development of transportation projects. It is also uniquely positioned by virtue of its experience in overseeing a variety of transportation areas such as aviation, public transportation and rail, freight strategy and policy, highways, and the Washington State Ferries.<sup>1</sup> WSDOT's established statutory authority, such as in purchasing, building and managing transportation corridors, and its established organizational structure and staffing may assist WSDOT in administering the WCC, managing professional relationships, and managing public relations on a project where a successful public relations plan is critical to the success of the WCC.

The Transportation Expansion Project (T-REX) in Colorado, formerly known as the Southeast Corridor Multi-Modal Transportation Project, is one project that has successfully used an existing government agency. T-REX is a multi-modal transportation project using design-build contracting that combines highway construction and light rail transit.<sup>2</sup> The Colorado Department of Transportation (CDOT), which is responsible for highway construction, and the Regional Transportation District (RTD), which is responsible for light rail, formed a unique partnership to address highway mobility and safety issues, while offering travelers the option of riding light rail through the corridor. CDOT and RTD signed an Intergovernmental Agreement (IGA) that outlined the responsibilities of each agency, a project description, an explanation of the design-build concept and the proposed method of financing the project. The T-REX project also involves federal agencies. The Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) signed an IGA that outlined the guiding principles and responsibilities regarding their work on T-REX. Groundbreaking for the project took place in 2001, after almost 10 years of planning. When it is completed in late 2006, it will offer expanded transportation options and safer highways in the metro Denver area.

The disadvantage to using an existing government agency is that it is less flexible and could slow down the process. The established powers, organizational structure and management that an existing government agency offers may not be well suited to the specific needs of the WCC. Furthermore, it may be difficult to make necessary structural modifications in WSDOT's organization to accommodate the needs of the WCC. For example, creating a department dedicated to the WCC may be procedurally or politically complicated. Such a division within WSDOT would have to compete for staffing, funding and other scarce resources available to the department. Additionally, WSDOT's powers are limited to state transportation purposes (and operating the state ferries).<sup>3</sup> This limitation could hobble pursuit of effective contracting structures for developing utility projects in the WCC.

---

<sup>1</sup> WSDOT Table of Organization. See Appendix 1.

<sup>2</sup> T-REX Fact Book (2003). Available at <http://www.trexproject.com/>.

<sup>3</sup> 47.01.260 RCW; 47.56.030 RCW.

## Joint Powers Authority

The second alternative is to create a joint powers authority (JPA).<sup>4</sup> A JPA is the consolidation of two or more public entities with common powers for the purpose of acquiring or constructing a joint-use facility. The joint powers agreement, which is approved and signed by all government participants, states its purposes and how that purpose will be accomplished or joint powers will be exercised. The agreement may be administered by one or more of the parties, or by a board or commission created specifically for this purpose. The entity created by the joint powers agreement is separate from the parties to the agreement. The agreement vests the entity with specified powers, such as the power to make contracts, hire employees, construct or operate buildings, and sue and be sued in its own name. A JPA's bonding authority and taxing power flows directly from the authority and power of the individual entities making up the JPA. In general, the debts, liabilities and obligations of the JPA will be those of the parties to the agreement, unless the agreement specifies otherwise.

New legislation would not be required to allow WSDOT to enter into a JPA. Section 39.34.030 of the Revised Code of Washington (RCW) allows public agencies to establish a joint powers authority and finance joint projects.

A JPA is most successful for discrete, focused projects in which the entities share very similar goals. The Kern Water Bank Authority in California, for example, is a JPA that has successfully and profitably involved farmers and water district officials in a growing water market. In contrast, California's Alameda Corridor Transportation Authority (ACTA) is a JPA formed by the Cities and Ports of Long Beach and Los Angeles to build the Alameda Corridor. Though the Alameda Corridor was ultimately successful, the broad and disparate range of interests among the different members often created conflict and delays. For example, the commercial interests of the ports were very different from the interests of the people living in the cities through which the Alameda Corridor traverses.

A principal disadvantage to a JPA for the WCC is the sheer difficulty of successfully forming one. Affecting, and located in, numerous state, regional, county and city jurisdictions, it would be a very complicated endeavor to appropriately include the best mix of jurisdictions to facilitate WCC planning and implementation. All-inclusive recruitment of jurisdictions could produce an unwieldy governance structure within the JPA. Failure to be all-inclusive would tend to assure opposition from omitted jurisdictions. Reaching consensus on the terms and provisions of a joint powers agreement could be unattainable.

Even if successfully formed, the JPA would be challenged to reach consensus, resulting in delayed decision-making. This is a particular concern for a project such as WCC which will involve a large geographical area, various modes of transportation and types of utilities, and therefore a broad range of diffuse interests. Shifting or conflicting political agendas among various constituent members of the JPA could delay if not thwart the mission of the agency. Narrow interests could use their powers within a JPA to obstruct work that may be in the best interests of the state generally.

---

<sup>4</sup> 39.34.030RCW. See Appendix 2 for the full text of the statute.

### Single Purpose Government Entity

The third alternative is to create a single purpose government entity, which is an entity that is created by the government for the sole purpose of planning and implementing a designated project. A single purpose government entity for the WCC can be formed only through new state legislation.

There are several advantages to single purpose entities. First, creating a single purpose government entity allows for the greatest flexibility, since the entity can tailor its structure to meet the specific needs of the project. It is also possible to create an entrepreneurial culture at a single purpose government entity, since it is unencumbered by existing policies and bureaucratic procedures. In addition, the single purpose government entity is able to select a team of professionals who are uniquely qualified and interested in the success of the project. Another distinct advantage is that a single purpose government entity is able to focus exclusively on the project and does not need to prioritize competing projects for time and funding. Examples of successful single purpose government entities include the Seattle Popular Monorail Authority (known as the Seattle Monorail Project), the Gold Line Construction Authority in Los Angeles and the Orange County Transportation Corridors Agencies.

It is critical that single purpose entities have the necessary powers and authority to direct the project and own right-of-way for project purposes.<sup>5</sup> Some of the difficulties the Seattle Monorail Project has encountered are the result of these constraints on its authority.

A disadvantage of a single purpose government entity is that it does not have the benefit of historic professional and political relationships that may assist in administering the project and securing public support. Another potential disadvantage is that a single purpose government entity may require additional effort to garner the support of existing government agencies who may be reluctant to have more competition for future federal funding.

### Recommendation

Of the three alternatives, a single purpose entity, vested with the powers and authority necessary to oversee project planning, development, and administration will most effectively achieve the successful development of the WCC while responding to environmental and social concerns. A project of this scope requires a team that is exclusively devoted to achieving its goals. A single purpose government entity would have the opportunity to create a structure and assemble a team that would be tailored to meeting the goal of creating an environmentally sensitive, efficient, safe and secure system that encompasses utilities and different modes of transportation. A single purpose entity also has great potential to foster an entrepreneurial culture with an emphasis on quality and accountability.

One of the predictable areas of controversy in adopting legislature to form a single purpose entity for the WCC will be its governance provisions. Provisions on such issues as whether the Board of Directors should be elected or appointed, on the process for election and appointment, on the number and composition of the Board of Directors, and on the interests they will represent all

---

<sup>5</sup> Right-of-way is a general term denoting land, property, or an interest, usually in a strip, acquired for or devoted to the corridor.

have political ramifications.<sup>6</sup> This report does not purport to make any recommendations on these issues; they must be sorted out through the legislative process. It is the experience of the authors, however, that the legislative process is, in the end, the most effective means to achieve compromise and balance among competing interests in controversial large infrastructure projects.<sup>7</sup>

In making this recommendation, we considered the fact that WSDOT has a broad variety of responsibilities to balance and that the addition of such a major program as the WCC could stretch its resources. The addition of the WCC to WSDOT's authority might also create conflicts between its continuing immediate responsibilities and the more long-term needs of the WCC. In addition, while WSDOT has expertise in managing different modes of transportation, it does not have authority to acquire, develop and manage utility infrastructure projects.

A Joint Powers Authority is also not optimal. Because the WCC will run through the jurisdiction of numerous cities and counties, including urban, suburban, and rural areas and involve a wide array of parties with differing interests, a truly representative JPA would have many members, making decision-making unwieldy and potentially ineffective.

## **POWERS AND AUTHORITY OF A SINGLE PURPOSE GOVERNMENT ENTITY**

To achieve the goals of the WCC efficiently, it is important to vest the single purpose government entity with the comprehensive powers and authority it needs to be effective. This section of the report identifies the powers and authority that will be instrumental to the operations and success of a single purpose government entity ("Entity") in developing the WCC.

### **Environmental Review**

One of the key initial steps in developing the WCC is conducting and successfully completing the NEPA and SEPA environmental review process. The Entity will need authority to act as lead agency for Tier 1 environmental review for NEPA and SEPA. It will need non-exclusive authority to act as lead agency for Tier 2 environmental reviews of projects within the corridor under NEPA and SEPA. Avoidance or minimization of adverse environmental and social impacts will be paramount in garnering the approvals and public support necessary for the development of the WCC.

---

<sup>6</sup> E.g. California state legislation established the Gold Line Authority for the single purpose of pursuing construction of the urban light rail transit line in two phases, with the second phase running east from the City of Pasadena to the easterly border of LA County. The legislation specifically provided for the appointments of several Board positions by city governments along the phase 1 route, but omitted the cities along phase 2 route. With phase 1 complete and attention turned to the second phase, the omitted cities have strenuously objected to the provisions on Board control and taken action seeking to obstruct the phase 2 work. The state legislature probably will intervene and amend the legislation to reconstitute the Board appointment powers.

<sup>7</sup> E.g. The Washington legislature intervened in major controversies affecting the proposed projects, including the Tacoma Narrows bridge, under the Public-Private Initiatives program, Chapter 47.46RCW, amending the statutory scheme on more than one occasion to address the competing concerns of affected citizens. The amendments ultimately enable the Tacoma Narrows Bridge project to be financed and proceed with construction.

### **Master Planning Authority**

In partnership with private enterprises, the Entity will need authority to adopt a master plan for the WCC, and periodically update, revise and supplement the master plan as necessary or desirable. The master plan will be a comprehensive document that will identify the modes and uses of the WCC and include the conceptual design showing overall alignment of the corridor, the relative locations of each mode, separations, as well as other major design features. Prior to the adoption of the master plan, the Entity should be statutorily authorized and obligated to consult with state agencies such as WSDOT, Department of Natural Resources (DNR), and the Department of Ecology (DOE), regional agencies such as Regional Transportation Investment Districts, regional planning organizations, cities and counties within the WCC or its area of influence, federal agencies such as the FHWA, FTA, and the general public. The advice of these various parties will provide the Entity with a broad range of important factors to consider in its master plan, allowing it to expedite the progress of the WCC. Additionally, such consultation is required for NEPA and SEPA review, important for public relations, and an effective means to garner support. The WCC will be responsible to take the necessary actions to protect, restore and enhance the environment and affected communities.

### **Right-of-Way Assembly and Management Authority**

The Entity will need authority to acquire, own, protect, lease and manage the WCC right-of-way and other property needed for the Entity's purposes, and to exercise the power of eminent domain as necessary to assemble and develop the WCC right-of-way. It will also need authority to adopt rules, regulations, guidelines, policies, covenants, conditions and restrictions (a) pertaining to the acquisition, financing, management, use, leasing, licensing, transfer, sale or other disposition of the WCC right-of-way; or (b) necessary or appropriate to assure environmental compliance, compatibility, interoperability, efficacy, efficiency, health and safety of all modes within the WCC. It is especially important to consider safety and security precautions for the utilities component of the WCC. We note that, as envisioned, utilities (including oil and gas) will be routed below grade, except for power transmission lines, greatly reducing the safety and security issues raised by above-grade installations.

### **Expenditure and Financing Authority**

The Entity must have the authority to raise funds and make expenditures as appropriate to carry out its purposes.

A critical factor to feasibility is the ability to secure private financial participation in the development of the WCC, given the many competing demands on limited public funds. Private financial participation requires authority to enter into innovative public-private contracting arrangements. The financial portion of the feasibility study identifies and analyzes various potential sources for financing the development, construction and operation of the WCC and will not be addressed here in great depth. Private entities that may have the capability and interest to contribute private sector financing to WCC projects include utilities, railroad companies, power companies, freight and trucking companies, lumber interests, oil and gas interests, highway developers and landowners.



The Entity will also need authority to issue debt for the purpose of funding WCC right-of-way acquisitions or funding other agency purposes and activities, provided that such authority should be limited to debt backed only by agency funds and revenues and not the full faith and credit of the State. Innovative finance techniques include cash management, Grant Anticipation Revenue Vehicles (GARVEEs), which are capital market borrowings repaid by future appropriations of federal transportation funds deposited in the state highway account, property benefit assessments, tax increment financing, developer mitigation fees, “shadow tolls,” local assessment bonds, deeply subordinated debt and deferred payments to design-build contractors, section 129 loans, concessions, and IRS 63-20 financing.<sup>8</sup> The Entity will need the authority to enter into or support all these forms of financing.

The Entity will also need authority to obtain and spend funds from federal loans and credits, such as through the federal Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA).<sup>9</sup> Under the TIFIA, the U.S. Department of Transportation may provide three forms of credit assistance—direct loans, loan guarantees, and standby lines of credit—for surface transportation projects of national or regional significance.<sup>10</sup>

Another critical source of financing is federal and state grants. The Entity will need authority to obtain and spend funds appropriated by the State and from federal grants, subject to the allocation authority of the State Transportation Commission over federal and state transportation funding. Federal funds may be available through the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21),<sup>11</sup> high-speed rail grants,<sup>12</sup> grants for public works and economic development from the U.S. Department of Commerce,<sup>13</sup> the Railroad Rehabilitation and Improvement Financing program and other public funding sources.<sup>14</sup>

### **Authority to Grant Rights of Use and Entry**

The Entity will need authority to grant short-term and long-term rights of use, rights of entry, licenses, leases, ground leases, franchises and concessions, for portions of the WCC: This authority should include grants to WSDOT for transportation and transit uses, with or without compensation, provided that all necessary financing for the subject transportation or transit project has funded or is ready to fund concurrently with transfer; grants to public and private utilities at fair market rental rates for utility uses; and grants to other government agencies responsible for developing or regulating connections with or to WCC facilities.

---

8 Karen Hedlund, *The Use of 63-20 Nonprofit Corporations in Infrastructure Development* (May. 2001) (unpublished article, Nossaman, Guthner, Knox, & Elliott internal document). See Appendix 3.

9 23 U.S.C.A. § 101.

10 Program Fact Sheet, *Transportation Infrastructure Finance and Innovation Act of 1998* (January, 2000). Available at <http://tifia.fhwa.dot.gov/>.

11 Transportation Act for the 21st Century, Pub. L. No. 105-178 (codified as amended in scattered sections of 23 and 49 U.S.C.A.).

12 49 U.S.C.A. § 24101

13 15 C.F.R. Part 24, Subtitle A. Available at <http://www.osec.doc.gov/oebam/15cfr24.pdf>.

14 Transportation Act for the 21st Century, Pub. L. No. 105-178 (codified as amended in scattered sections of 23 and 49 U.S.C.A.). The Railroad Rehabilitation and Improvement Financing program is a part of TEA-21. See <http://www.fhwa.dot.gov/tea21/factsheets/r-rrehab.htm>.

### **Contracting Authority**

The entity will need authority to execute and deliver contracts, agreements, affidavits, certificates and other instruments and documents reasonably necessary to achieve its purposes.

This authority should include the power to enter into contracts with private entities for the development of all types of transportation projects. The Entity need authority to sue and defend suits, and will be subject to appropriate governmental immunities.

### **Authority Respecting Intergovernmental Agreements**

The Entity need authority to enter into intergovernmental agreements for the master planning, financing, management and development of the WCC.

### **Transfer and Sale Authority**

The Entity will need authority to transfer and sell portions of the WCC as necessary or desirable to: (a) WSDOT for transportation and transit uses, with or without compensation, provided that all necessary financing for the subject transportation or transit project is arranged and has funded or is ready to fund concurrently with transfer; (b) public and private utilities at fair market value for utility uses; (c) public and private parties regarding surplus and remnant parcels of land that are not needed for reasonably foreseeable purposes of the WCC. Sale of surplus and remnant parcels should be subject to existing state law regulating such sales.

### **Procurement and Employment Authority**

The Entity will need authority to employ staff as needed. It will also need authority to procure and retain, under general state procurement laws and regulations, consultants and advisors, including planners, appraisers, surveyors, geotechnical engineers, architects, engineers, real estate, investment, insurance and other brokers, estimators, attorneys, traffic and revenue consultants, etc.

It is advisable to provide the Entity with flexible procurement authority for procuring public-private contracts and other contracts for the design, construction, operation and maintenance of WCC projects. The types of contracting arrangements in public-private partnerships are described below. Typical sealed low bid procurement procedures are not well suited to these contracting arrangements, because selection depends not merely on pricing but on the qualifications, ideas and technical capabilities of the private party. Accordingly, the Entity should have the authority to conduct procurements using other techniques, including competitive negotiation, qualifications-based selection and best value selection. Precedent for such procurement authority is discussed below.

### **Insurance Authority**

The Entity will need authority to carry insurance or self-insure. It is quite possible that the most cost-effective means to place insurance will be through an owner-controlled insurance program. OCIPs are one form of “wrap-up” insurance, in which owners, contractors and their respective subcontractors all can be insured under one common program managed by the owner. However,



under current Washington law, public agencies lack the ability to construct a full, effective OCIP. RCW 48.270 prohibits any public agency or authority in connection with competitive bidding for a public contract from requiring competitors “to obtain or procure, any ... contracts of insurance specified in connection with such contract from a particular insurer or agent or broker.” It further prohibits the public agency or authority from “obtain[ng] or procur[ing] any of such ... contracts of insurance, except contracts of insurance for builder's risk or owner's protective liability, which can be obtained or procured by the bidder, contractor or subcontractor.”

Special legislation granting an exception from RCW 48.270 was adopted to allow Sound Transit to to put together an OCIP program. The benefits of an OCIP for a multi-dimensional, long-term project like the WCC may be significant. Accordingly, legislative exception to RCW 48.270 for the Entity should be considered.

### **Limitations on Power and Authority**

The Entity’s powers and authority should be commensurate with its limited purposes. Its purposes are only to assemble and manage the WCC right-of-way and to facilitate, oversee and manage design, construction, operation and maintainance of projects in or relating to the WCC. Recommended ancillary powers and authority include:

- Conceptual design for master planning of the WCC;
- Design and construction of facilities within the WCC if not appropriate for design and construction by third parties;
- Design and construction of agency administrative and management facilities;
- Design and construction of conduits, fiber optic lines and equipment for telecommunication uses, including the operation of the same for the sole purpose of providing support for other corridor uses and for the Entity’s telecommunication needs;
- Operation of projects due to reversion of ownership to the Entity upon expiration or earlier termination of any franchise, lease, concession, license or right of entry granted to a third party; and
- In conjunction with or upon the written consent of WSDOT, design or construction of improvements to transportation projects under WSDOT’s jurisdiction as may be appropriate to achieve connectivity or full efficiency of the WCC.

Implicit in this limited purpose model are limitations on the Entity’s power and authority. The legislation should set forth express limitations. Among the fundamental limitations to be considered are the following:

- Restrictions on ownership, operation and maintenance of any highway improvements (unless within the foregoing ancillary powers), which functions should rest either with WSDOT or with a private concessionaire or franchisee;
- Restriction on ownership, operation and maintenance of utilities (unless within the foregoing ancillary powers), which functions should rest with the public and private utilities that utilize the WCC;
- Restrictions on engaging in any regulatory activity that is within the power of any other state regulatory agency;

- Prohibitions on making gifts of public funds or assets; and
- Restrictions on authority to impose any general or special tax, provided the Entity should be authorized to issue debt backed by the tax revenues of other taxing authorities, and take loans of proceeds of such debt issued by other taxing authorities.

## **Challenges to WCC Public Private Partnerships**

### **Description of Public Private Partnerships**

Public-private partnerships are innovative collaborations between the public and private sectors that expand upon the traditional private sector participation in project design, financing, operation, and maintenance. Public agencies will consider public-private partnerships where any of the following circumstances exist:<sup>15</sup>

- Need for private sector special expertise with project development or operations;
- Ability to generate a dependable revenue stream from project operations;
- Need for accelerated project delivery;
- Need for innovative solutions to design or construction problems;
- Project involves repetitive design and construction elements;
- Desire for enhanced project quality;
- Need for cost certainty early in the project development process;
- Insufficient staff to manage a traditional project;
- Lack of sufficient staff experience with the type of project
- Lack of public funds to finance the project

Public-private partnerships take various forms, including long-term concessions, franchises, Design-Build-Operate-Maintain, and Design-Build.

### **Concessions and Franchises**

In the context of infrastructure projects, the terms franchise and concession are often used interchangeably. For simplicity, we will use the term concession for both franchises and concessions. Under concession agreements, the government grants the right to a private entity to finance, build, own (or lease), and/or operate. The public agency and the selected private entity typically negotiate the terms of exclusive development and operating rights for a fixed term of years. The agreement may also contain a non-compete provision. The public agency may retain ownership of the facility or real property on which it is constructed with a lease back to the developer, or it may transfer ownership to the developer that reverts back to the government after the concession ends.

The public agency may award a concession for a project that it conceives, request proposals for project development from the private sector, or in certain jurisdictions, accept unsolicited

---

<sup>15</sup> In part, from Nancy C. Smith, Brian G. Papernik, and Corey A. Boock, Design-Build Contracting with State and Local Agencies, in Design-Build Contracting Handbook, 391, 394-395 (Robert F. Cushman and Michael C. Loulakis eds., 2nd Edition, 2001).

proposals. The agency evaluates proposals based on the independent merit of the submitted project concepts against predetermined criteria, as well as the proposer's technical, management, and financial strength.

A concession project necessarily requires an operating revenue stream to service project debt and provide the concessionaire the opportunity to earn a return on investment. Concessions typically provide for early termination if and when a maximum allowable return on investment is realized.

In addition, the public agency will usually retain the right to terminate the concession if the contractor fails to proceed to develop and finance the project in accordance with predetermined performance milestone schedules. It also provides general oversight of construction to ensure it complies with the concession agreement, applicable state standards, and other legal requirements.

### **Design Build**

In design-build, the design-builder is responsible for the design and construction of the project in accordance with specified design parameters or performance specifications. A publicly funded design-build project typically involves a government agency giving contractual delegation to a builder of full authority and responsibility for assembling and managing all disciplines and resources required to complete the design and construction of a project, with the right to receive progress or milestone payments as work is performed. RCW § 39.10.051(1) defines design-build as "a contract between a public body and another party in which the party agrees to both design and build the facility, portion of the facility, or other item specified in the contract."<sup>16</sup> The contract price is typically a lump sum or guaranteed maximum price. Design-build is suitable for public agencies needing to operate under, or wishing to impose on a project, fiscal and/or schedule constraints and willing to cede detailed project control to a contractor in exchange for price and completion guarantees and broader performance warranties. Many state highway agencies have used design-build on projects.<sup>17</sup>

Although Washington's design-build statute does not explicitly refer to the ability to select proposals based on best value, best value selection is implied by RCW §39.10.051(4), which states that contracts for design-build services shall be awarded through a competitive process that includes factors other than price. It describes a number of factors a public body will use to evaluate requests for proposals including in part:

...proposal price; ability of professional personnel; past performance on similar projects; ability to meet time and budget requirements; ability to provide a performance and payment bond for the project; recent, current, and projected work loads of the firm; location; and the concept of the proposal.<sup>18</sup>

However, where proposals are deemed equivalent, best price will determine selection. 39.10.051(5) RCW provides as follows:

---

<sup>16</sup> 39.10.051(1) RCW. See Appendix 4.

<sup>17</sup> Smith et al., *supra* note 14, at 405.

<sup>18</sup> 39.1.051(4)(d) RCW. See Appendix 4.

...If the public body determines that all finalists are capable of producing plans and specifications that adequately meet project requirements, the public body *may* award the contract to the firm that submits the responsive *best and final proposal* with the *lowest price*.<sup>19</sup>

### Design-Build-Operate-Maintain

Design-Build-Operate-Maintain (DBOM) is an innovative contracting method that reduces the time and owner risks associated with delivering major projects. In DBOM, the design-builder is responsible for the design, construction, operations, and/or maintenance for a specified period. Financing of the project may come from the public agency, from the design-builder or a combination of public and private sources.<sup>20</sup> It provides a powerful incentive for the team to build a high-quality system that will endure over time. Proposing teams bid on all aspects as a single package. The price is typically a fixed amount (usually with the price for operations and maintenance subject to escalation on a specified index), often coupled with incentives and disincentives. Operating costs sometimes include a variable component based on units of output (e.g. water/wastewater flow) or usage (e.g. vehicle trips). Hence, costs, including base operations and maintenance costs, are known up front with a greater degree of certainty.<sup>21</sup> DBOM also ensures that the entity designing the project will be thoughtful about the expense of operations and maintenance, since inefficiencies in those areas will ultimately affect profitability. DBOM is distinguished from concessions by the lack of direct private participation in revenue opportunities and risks.

### Recommendation of Public-Private Partnership

The use of public-private partnerships is recommended for, if not essential to the success of, the WCC. This section briefly discusses the primary reasons for this recommendation.

### Innovative Financing

It is foreseeable that public sector funding will be insufficient to develop the WCC. Private sector partners bring capital and can make up-front payments to a government agency that has significant financial needs. Traditional state and federal funding is scarce and often involves a long waiting period. In California, for example, toll roads were originally planned as freeways but traditional state or federal funding was not available. The projections of new housing development and an influx of population in the area made the need for new roads critical. Instead of waiting for state or federal funding, Orange County leaders in the early 1980s decided to look at alternative ways to fund road construction. In 1986, the state legislature authorized the creation of the Transportation Corridors Agencies (TCA) to collect developer fees and tolls to finance, design, build and operate the roads. TCA was authorized to issue non-recourse bonds that could be sold to private investors,

---

<sup>19</sup> 39.1.051(5)(b) RCW. Italics added. See Appendix 4.

<sup>20</sup> E.g., the SH130 turnpike in Texas is being developed under a DBOM project delivery method. Financing sources include federal and state grant funds, TIFIA financing, toll revenue bonds and subordinated contractor debt.

<sup>21</sup> James Dobbs, Privatization: What Works and What Doesn't, Privatizing Government Functions, 4-1, 4-6 (Deborah Ballati ed., 2003).

and to collect tolls to repay the bond debt. Without this innovative financing plan, the roads would not have been built and existing roads would carry the burden of additional traffic.

### Technical Innovation

Projects pursued through public-private partnerships typically rely on the private partner to develop design subject to basic scope or work requirements and performance parameters and specifications. Prescriptive specifications are minimized, enabling the private partner to introduce its own concepts for design and its own means, methods and techniques to execute the work, so long as they satisfy the owner's performance criteria and comply with law.

As a result, public-private partnerships create better opportunities for the private sector to develop and apply their innovations. The private sector can invest in technology and systems innovations that the public sector cannot obtain because of lack of funds or the complexities of procurement systems.<sup>22</sup>

### Risk Management

Private sector partners bring cohesive, integrated decision-making to the design and construction process and are the single point of responsibility for quality, cost and schedule adherence.<sup>23</sup> In a design-build approach, for example, conflicts between design and construction are the responsibility of the design-builder and not the government agency. Hence, the government agency is relieved of the risk that construction costs or schedule may increase due to faulty design or engineering, as well as risks associated with coordinating between the designer and the builder. Having sole responsibility for the design and construction of a project is also a strong motivator for the private party to maintain quality, since it is not possible to shift deficiencies to another party. Public-private partnerships realize cost savings because there is only one team working together to evaluate alternative designs, materials, and methods efficiently and accurately, which shortens the length of time to complete a project.<sup>24</sup>

Public-private partnerships expand the choices for allocation and management of risks. For example, the success of an infrastructure concession often depends upon the ability of private entrepreneurs to raise the equity and loan capital needed for a project. Since private investors and lenders seek returns on investments equal to those they can obtain elsewhere with similar levels of risk, and since governments want sustainable concessions, both must know the acceptable levels of risk and return, and what is required for concessionaries to attract adequate financing.

The WCC will greatly benefit from the fair allocation and management of risk. Design-build or DBOM projects typically require contractors to commit significant time, effort and money up-front to submit a proposal. To draw a large enough pool of proposals to stimulate competition, it is essential that contractors be able to accurately estimate their costs. The increase in competition is desirable because it translates into value pricing, which benefits the public. Because the WCC will encompass a large geographic area and involve multiple phases of development of diverse

---

<sup>22</sup> Id., 4-5.

<sup>23</sup> Design-Build Institute of America, *An Introduction to Design-Build*, Document Number 101, Design-Build Manual of Practice, First Edition, (October 1996).

<sup>24</sup> Id.

infrastructure, the fair allocation of risk is essential to encouraging competition in the proposal process and achieving the best value.

The fair allocation of risk requires several steps. First, it is important to identify all of the possible risks. These risks cover a broad range of categories and include safety, environmental protection, service quality, technical, commercial, as well as random, unpredictable events. For example, there is the risk of design flaws, encountering environmentally protected plants or species, rising prices of building materials, other changes in market conditions, changes in law and natural catastrophes such as wildfires or earthquakes. Second, once the parties have identified all of the possible risks, they may begin to estimate the probability of each event occurring and its magnitude of impact on cost and schedule. This allows the parties to quantify risk by determining expected values. Based on these figures, parties may decide how to best allocate all of the possible risks. For example, in the case of rising prices of building materials, the contractor may agree to pay for price increases up to a certain limit, after which the owner would be responsible.

Once the parties have properly identified, estimated, quantified and allocated the risks, they may engage in various strategies to manage them. Risk allocation and mitigation tools include contractual indemnities, fully considered insurance requirements given current market conditions, bonding, contingency pools, allowances, bondholder risk absorption and potentially, limitations on liability.

### **Intermodalism**

Intermodalism is an integral aspect of the WCC.<sup>25</sup> Public-private partnerships harness private sector innovations in intermodalism, design, engineering, and operations to improve performance and create efficiencies. The freight industry, for example, has applied the concepts of intermodalism for many years to provide an efficient transport of goods for the best value. In addition to allowing the convenient, rapid, efficient and safe transfer of people or goods from one mode to another, intermodalism offers the benefits of expanding the choices of transportation options. Finally, intermodalism requires collaboration among the different transportation organizations and operators, which encourages each organization and operator to continually improve its service and adopt best practices.

### **Public-Private Partnership Legislative Precedent**

#### **Washington**

In the state of Washington, the secretary of transportation has general public-private partnership authorization under the provisions of Chapter 47.46 RCW.<sup>26</sup> RCW § 47.46.10 provides in relevant part as follows:

The secretary of transportation should be permitted and encouraged to test the feasibility of building privately funded

---

<sup>25</sup> In this chapter, we use the term “intermodal” to refer to an integrated system in which utilities and individual modes of transportation, such as automobiles, mass transit, and passenger and freight railways, work together to provide the user with the best choices of service and in which the consequences of a policy on a single mode are considered for all modes.

<sup>26</sup> Chapter 47.46 RCW. See Appendix 5 for full text.



transportation systems and facilities or segments thereof through the use of innovative agreements with the private sector. The secretary of transportation should be vested with the authority to solicit, evaluate, negotiate, and administer public-private agreements with the private sector relating to the planning, construction, upgrading, or reconstruction of transportation systems and facilities.<sup>27</sup>

Chapter 47.46 also authorizes the use of private entities to design and operate proposed facilities,<sup>28</sup> including “...highways, roads...transit stations and equipment, transportation management systems, and other transportation-related investments.”<sup>29</sup> Public-private partnerships authorized under Chapter 47.46 RCW are subject to the approval of WSDOT, state and local lead agencies, and must have public support. A legislative oversight committee is responsible for monitoring and reporting on the progress, execution, and efficiency of design-build contracts for such public-private projects.<sup>30</sup>

Chapter 47.46 has been less than ideal in generating public-private projects. In 1994 WSDOT solicited proposals for up to six demonstration projects, as authorized by 47.46.030(1) RCW. WSDOT accepted six proposals for negotiation, including two toll bridges (the Tacoma Narrows bridge and the SR 520 floating bridge), two toll roads (SR 18 and SR 522), a park and ride facilities project and a proposal for congestion pricing of new toll lanes in the Puget Sound region. Several of the projects were abandoned during negotiations due to intense local opposition. The Legislature then intervened and amended Chapter 47.46 to bar any congestion pricing project absent legislative approval<sup>31</sup> and to require an “advisory vote” in the “affected project area” for all other projects receiving petitions of opposition with 5,000 or more signatures.<sup>32</sup> The amendments neither defined the meaning of an advisory vote nor indicated what legal effect, if any, it would have. The advisory vote process interposed considerable delay while administrative rules were adopted, analysis conducted to identify and certify the affected project areas, public comments received and elections held. These delays led to abandonment of all remaining projects other than the Tacoma Narrows Bridge, which went to election and received a majority advisory vote in November 1998.

Thereafter, WSDOT and the private developer for the Tacoma Narrows Bridge entered into a second round of intensive negotiations of public-private agreements for the financing, design, construction, operation and maintenance of the project. After agreement was reached, final environmental review and documentation proceeded, followed by further preliminary design and permitting and approval work. In addition, the developer formulated and started implementing a plan for the private finance of the project through issuance of tax-exempt toll revenue bonds.

Throughout this period, WSDOT defended against several lawsuits brought by a small local citizen’s group seeking to halt the project or force it to be financed without tolls. All but one of the lawsuits failed. However, in 2000 the Washington supreme court brought work on the project to a halt when it held that WSDOT lacked the authority to toll the project.

---

<sup>27</sup> 47.46.010 RCW.

<sup>28</sup> Id.

<sup>29</sup> 47.46.020 RCW.

<sup>30</sup> 47.46.180 RCW.

<sup>31</sup> 47.46.010 RCW.

<sup>32</sup> 47.46.030(3) through 47.46.030(10) RCW.

It took the Legislature almost two years to enact legislation that cured the legal infirmities cited by the supreme court. This legislation, however, provided the state with the preemptive right to finance projects under Chapter 47.46 RCW with state bond financing<sup>33</sup>, notwithstanding that a developer's proposal and economic terms may be predicated on private sector financing. If the private developer does not accede to any such election, WSDOT is prohibited from proceeding with the project.<sup>34</sup> The legal and practical effect was to place the financing burden for the Tacoma Narrows Bridge project on the State's treasury, subject to reimbursement from toll revenues. These legislative changes required yet a third round of negotiations to change the role of the developer in the project and finalize terms and price for the design-build contract for the project. It was not until September 2002, eight years after WSDOT received the initial public-private proposal for the Tacoma Narrows Bridge project, that financing closed and construction began.

The adverse experiences on the six demonstration projects, and particularly the Tacoma Narrows Bridge project, have dampened the appetite of the private sector for risk-taking during the early development stages. The developer of the Tacoma Narrows Bridge project agreed under its development contract to defer compensation for the cost of most pre-financing work, with compensation dependent on successful close of financing. The developer stood to lose approximately \$25 million of investment in the work if the project had not proceeded. The risks caused by legislative changes, the advisory vote and adverse court decisions, not to mention the substantial risk that environmental clearances, permits and approvals might not have materialized, were sobering to the developer and the private sector transportation industry in general. No solicitations of proposals for new projects under Chapter 47.46 RCW are currently outstanding, requested or planned.

### **Comparison to Other States**

Currently, 23 states have legislative authority for public-private partnerships.<sup>35</sup> Some states have established broad authority to engage in public-private partnerships,<sup>36</sup> while other states limit public-private partnerships to specific projects.<sup>37</sup>

Texas is an example of a state that has broad public-private partnership authorization. Texas Transportation Code §227.023 states in relevant part "...the department shall encourage the participation of private entities in the planning, design, construction and operation of facilities."<sup>38</sup> Texas allows the Texas Department of Transportation (TxDOT), the Texas Turnpike Authority, and Regional Mobility Authorities to accept both solicited and unsolicited bids for public-private partnerships. Texas also adopted legislation that was tailored to aid the creation of the Trans-Texas Corridor.

Virginia also authorizes public-private partnerships and allows both solicited and unsolicited proposals through the Public-Private Transportation Act of 1999 (PPTA), which was enacted to make public-private highway partnerships as adaptable and efficient as possible. The PPTA

---

<sup>33</sup> 47.46.070 RCW.

<sup>34</sup> 47.46.070(3) RCW.

<sup>35</sup> See Appendix 6.

<sup>36</sup> E.g., Ark. Stat. Ann. §§ 28-7701 to 28-7758.

<sup>37</sup> E.g., 20 Ill. Comp. Stat. § 2705-450 (providing public-private partnerships for high speed rail and magnetic levitation transportation).

<sup>38</sup> Tex. Transp. Code Ann. Ch. 227.

streamlined the application and approval process and returned the responsibility of project evaluation and selection to the Department of Transportation.<sup>39</sup> While the state has the power to issue proposals, the PPTA allows the private sector flexibility to select the types of projects it wishes to implement rather than have to take a complete package. This flexibility allows the state to capitalize on the creativity of the private sector. A unique provision of the PPTA is that it gave the state the ability to use its condemnation power on behalf of a private developer of a public-private partnership.<sup>40</sup>

### **Limits on Private Sector Participation in Environmental Review**

One of the threshold issues facing any public-private partnership for the development of infrastructure projects is what role the private partner may play in environmental review and assessment of the project under the National Environmental Policy Act ("NEPA") and Washington's State Environmental Policy Act ("SEPA"). This section discusses the law applicable to this issue.

#### **NEPA**

Congress adopted NEPA in 1969 to ensure the evaluation of the probable environmental consequences of a proposal before federal agencies make a decision.<sup>41</sup> NEPA also allows federal agencies to change, condition, or deny proposals based on environmental considerations. NEPA applies to (1) federal projects, (2) any project requiring a federal permit, and (3) projects receiving federal funding

Council on Environmental Quality (CEQ) regulations state that an environmental impact statement (EIS) prepared pursuant to the requirements of NEPA "shall be prepared directly by or by a contractor selected by the lead agency" (or where appropriate, by a federal cooperating agency).<sup>42</sup> The stated intent of the regulations is to avoid any conflict of interest. Any "financial or other interest in the outcome of the project" would cause a conflict of interest.<sup>43</sup> This includes any known benefits other than general enhancement of professional reputation.<sup>44</sup> The CEQ's interpretation of this regulation (section 1506.5, subd. (c)) is that "a firm which has an agreement to prepare an EIS for a construction project cannot, at the same time, have an agreement to perform the construction, nor could it be the owner of the construction site."<sup>45</sup>

Furthermore, contractors shall "execute a disclosure statement. . . specifying that they have no financial or other interest in the outcome of the project."<sup>46</sup> The statement assures the public that the EIS is "free of subjective, self-serving research and analysis."<sup>47</sup> "If the document is prepared by contract, the responsible Federal official shall furnish guidance, participate in the preparation and

---

<sup>39</sup> Dobbs, *supra* note 17, at 4-9.

<sup>40</sup> *Id.*

<sup>41</sup> 42 U.S.C. § 4321.

<sup>42</sup> 40 C.F.R. § 1506.5, subd. (c) (1999).

<sup>43</sup> Forty Most Asked Questions Concerning CEQ's NEPA Regulations (40 Questions) 46 Fed.Reg. 18028, (March 23, 1981), as amended, 51 Fed. Reg. 15618 (April 25, 1986).

<sup>44</sup> 40 Questions, Question No. 16.

<sup>45</sup> CEQ 1983 Guidance Regarding NEPA Regulations, 48 Fed.Reg 34263 July 28, 1983 (CEQ Guidance).

<sup>46</sup> 40 C.F.R. § 1506.5, subd. (c) (1999).

<sup>47</sup> 48 Fed.Reg. 34263, July 28, 1983.

shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents."<sup>48</sup>

NEPA cases prior to the Transportation Equity Act for the 21<sup>st</sup> Century ("TEA-21") addressed contractor involvement in environmental analysis where the contractor was also the design engineer or would be the manager of future construction of the project or the developer of the project.<sup>49</sup> These cases hold that a firm with a financial interest may "assist" in drafting the EIS, and can provide data, reports, etc. as long as the federal agency remains ultimately responsible for the EIS. The contractor or its affiliates can provide project information, engineering and design services that are used by the environmental consultant in the preparation of the environmental documents. Examples of such services include engineering drawings and geotechnical studies. The key factors in these cases were the extent of the federal agencies' active and independent participation in the EIS; the agencies did not just rubber stamp the material provided by others.

In these cases, the contractors participated or assisted in the preparation of the EIS, they did not "prepare" the EIS. A "preparer" is one who puts in written form or draws up a document...<sup>50</sup> A preparer has discretion "to accept, reject, or modify the information submitted for consideration by subordinate participants in the EIS process."<sup>51</sup>

Under §112(g) of TEA-21, Congress authorized the preparation of highway impact statements by engineering firms. Section 112(g) provides that a state may procure the services of a consultant to prepare any environmental document for a highway project, as well as subsequent engineering and design work on the project if the State conducts a review that assesses the objectivity of the environmental document prior to its submission to a federal agency.<sup>52</sup>

Congress enacted this statute to allow State highway agencies to hire engineering firms to prepare environmental documents and conduct engineering and design work for the project evaluated in the environmental document. Section 112(g), however, does not authorize a firm to provide both environmental and construction services on the same project. Thus, the statute does not insulate the private partner from the general NEPA conflict of interest rules.

Only one reported decision ("AWARE") has addressed the TEA-21 NEPA amendment.<sup>53</sup> In AWARE, the issue was a contract for preliminary and final design work, not for construction. The

---

48 40 C.F.R. § 1506.5, subd. (c) (1999).

49 *Essex County Preservation Assn. v. Campbell* (1st Cir. 1976) 536 F.2d 956, 959, 960 (Design Engineer for highway project may participate in drafting the EIS (as private construction firms involved in constructing a project have done) but considerable caution must be exercised by federal agency who bears responsibility for ultimate work product); *Life of the Land v. Brinegar* (9th Cir. 1973) 485 F.2d 400, 468 (Construction management firm with financial interest in airport runway project may assist in drafting EIS where there was significant and active participation by federal agency); *Sierra Club v. Lynn* (5th Cir. 1974) 502 F.2d 43, 59 (Financially interested developer of new community can provide data, reports and assistance in EIS, because HUD performed analytical and judgmental functions of drafting EIS); *Lake Erie Alliance for Protection of Coastal Corridor v. United States Army Corps of Engineers* (W.D. PA 1981) 526 F. Supp 1063, 1073 (Permit applicant for improvements in lake can supply information and respond to comments on Draft EIS because Corps of Engineers evaluated validity and accuracy of studies).

50 *Sierra Club v. Marsh*, (D. Me. 1989) 714 F.Supp. 539, 551.

51 *Id.* at 551.

52 23 U.S.C.A. § 112, subd. (g).

53 *Associations Working for Aurora's Residential Environment ("AWARE") v. Colorado Dept. of Transportation* (10th Cir. 1998) 153 F. 3d 1122.

court held that the contractor preparing the EIS did not have a conflict of interest. The court reached this conclusion based on the fact that the contractor had no contractual guarantee of future work on the project; an expectation of future work is not a conflict. When the contract was amended to add preparation of the EIS, the design work was eliminated from the contract. The court also emphasized the importance of agency involvement in directing the analysis because this active role strengthens the public perception of the integrity of the process, even when the contractor performs future work on the project. Referring to TEA-21, the court noted that Congress shares this view.

## **SEPA**

The SEPA, adopted in 1971, is Washington State's counterpart to NEPA.<sup>54</sup> SEPA provides the framework for agencies to consider the environmental consequences of a proposal before taking action. It also gives agencies the ability to condition or deny a proposal due to identified likely significant adverse impacts. SEPA does not limit the participation of the private sector in environmental review.

## **Joint NEPA/SEPA Review**

A federal agency can delegate preparation of the EIS to a state agency (if the agency or official has statewide jurisdiction), and can utilize documents prepared by a consultant or project applicant as long as the federal agency retains sufficient control and responsibility for the NEPA compliance. In addition, agencies are encouraged to issue combined documents that meet the requirements of both NEPA and SEPA. For example, when an environmental impact statement (EIS) is needed for a proposal, the NEPA and SEPA lead agencies may agree to be co-lead agencies and issue a joint NEPA/SEPA EIS. The NEPA regulations **require** federal agencies to cooperate "to the fullest extent possible to reduce duplication between NEPA and State and local requirements." 40 C.F.R. § 1506.2(b). The EIS will discuss all issues needed to meet the needs of both agencies. In some instances a federal agency may use existing SEPA documents to meet NEPA requirements, depending on the adopted NEPA policies of that agency. Federal delegation of NEPA preparation to a state agency, or joint preparation of the combined NEPA/SEPA EIS, still must proceed in compliance with NEPA's conflict of interest regulations. The requirement for analysis of conflicts and completion of the disclosure statements is not eliminated by delegation or joint preparation. The conflict of interest regulations apply any time a federal lead agency determines that it needs contractor assistance in preparing an EIS. (CEQ Guidance).

## **Summary**

In summary, a private sector partner cannot complete the NEPA document on its own. However, it may work on the NEPA documentation as well as do follow-up design work. This can be done under separate contracts for NEPA and design work or under a single contract. The lead agency, however, must provide direction and oversight over any actual NEPA document. There are several cases where a highway construction contractor has submitted extensive environmental analysis to a state highway authority (SHA) that, in turn, was used by the SHA in finalizing its independent NEPA document. To comply with §112(g), the state must conduct a review assessing the objectivity of the environmental documentation prior to submission for approval.<sup>55</sup>

---

<sup>54</sup> Wash. Admin. Code § 197-11.

<sup>55</sup> Id.

## **Recommendation for Public-Private Partnership Legislation**

There are some statutory tools in place that will facilitate the development of the WCC, but the State of Washington will need to enact new legislation to fully realize the goals of the WCC. First, legislation authorizing the creation of a new single purpose state entity is required. Under § 35.21.730 RCW, cities, towns, and counties have the authority to create public corporations, commissions, and authorities to perform any lawful public purpose or public function.<sup>56</sup> However, because the WCC will encompass several cities, towns, and counties, it is not possible to create a single purpose entity for the WCC under this section.

The Entity's authority to enter into public-private partnerships should be strong. The new legislation should incorporate existing public-private partnership authority granted to WSDOT under Chapter 47.46 RCW, grant additional authority to expedite processes related to the WCC, as well as provide flexibility in dealing with utilities, railroads, and private landowners. One of the strengths of Chapter 47.46 RCW is its mandate for citizen participation through local involvement committees. Public-private agreements must "include a process that provides for public involvement in decision making with respect to the development of the projects."<sup>57</sup> The private entity must "proactively seek public participation ... that assesses and demonstrates public support among: Users of the project, residents of communities in the vicinity of the project, and residents of communities impacted by the project."<sup>58</sup> The public involvement process is to be "comprehensive" and afford opportunity to comment on key issues such as project alternatives, design, environmental assessment, right-of-way, traffic impacts, tolling, project cost, construction impacts and operations.<sup>59</sup>

However, simply including the Entity in the scope of Chapter 47.46 RCW will not be sufficient to enable practicable and workable formation of public-private partnerships due to a number of shortcomings in that statute.

First, the limitation on the number of demonstration projects under 47.46.030 RCW (to six projects) is unworkable for the WCC, which predictably would include multiple projects and facilities over time. The legislation should remove the six-project limitation or at least not apply it to the WCC.

Second, the statute lacks the flexibility to allow private parties to submit, and WSDOT to consider, unsolicited proposals. This contrasts with the more successful programs in Texas and Virginia, and the new public-private law in Georgia, all of which contain procedures for unsolicited proposals. Chapter 47.46 RCW does not permit WSDOT to consider or solicit proposals until 45 days after potential projects are submitted to review and comment under a public involvement plan approved

---

<sup>56</sup> 35.21.730(5) RCW. See Appendix 8.

<sup>57</sup> 47.46.040(8) RCW.

<sup>58</sup> 47.46.040(9) RCW.

<sup>59</sup> Id.



by the state legislature, submitted to review by the State Transportation Commission and submitted for consideration by the legislative transportation committee.<sup>60</sup> This is a long, cumbersome process that discourages private developers from initiating potential projects.

Third, the advisory vote requirement and restrictions on private participation in project financing limit the continuing effectiveness of Chapter 47.46 RCW as a means to engender new transportation infrastructure development in Washington. The advisory vote, with its legal vagueness, considerable delay and uncertainty of outcome, is a formidable obstacle to new project proposals. The potential for state preemption of private financing under Chapter 47.46 RCW discourages investment and financing innovations from the private sector. An additional discouragement is a requirement that a citizens' advisory committee first review and comment on any imposition or modification of toll rates. This provision creates uncertainty that has yet to be tested in the bond markets.

We recommend that public-private statutes in other states be reviewed and the history of projects thereunder be surveyed to ascertain advantages, disadvantages and current best practices. Such a survey will inform the State about amendments to Chapter 47.46 RCW that can improve its effectiveness.

Legislation for the Entity should also establish all the powers and authority discussed in *Powers and Authority of a Single Purpose Government Entity* above. This includes authorizing the Entity to acquire property by purchase or condemnation for all purposes contemplated by the WCC master plan, including entering into franchise and concession agreements. This authority should include the power to acquire additional right-of-way and lease it to private entities for compensation. The Entity should have explicit authority to enter into contracts with public and private entities for all types of transportation and utility projects. Legislation should also establish the Entity's authority to issue non-recourse debt, set tolls, enter into master development agreements, direct utility installations, and exercise other appropriate means to fully develop the WCC project.

## **Design Issue Regarding Utilities**

Depending upon the ultimate width and alignment of the WCC, there may be an issue with the placement of utility lines in highway right-of-way. The current proposal has a minimum right-of-way requirement of 500 feet and a maximum of 710 feet. The design width for the corridor of 500 feet requires installation of below-grade oil and gas pipelines and below-grade fiber optic lines directly underneath the shoulder of the planned highway right-of-way.

Under 47.44 RCW, WSDOT may grant franchises to "persons, associations, private or municipal corporations, the United States government, or any agency thereof to use any state highway for the construction and maintenance of ...gas, oil...".<sup>61</sup> However, FHWA and WSDOT utility accommodation policies restrict the type of proposed longitudinal installation in which utilities run directly underneath highway right-of-way.<sup>62</sup> Longitudinal installations raise issues of access for maintenance of oil and gas pipelines, concerns of traffic disruption, and safety.<sup>63</sup> WSDOT

---

<sup>60</sup> 47.46.030(2) RCW.

<sup>61</sup> 47.44.010 RCW. See Appendix 9.

<sup>62</sup> WSDOT, Utilities Accommodation Policy, M22-86, 3-5 (May 1992).

<sup>63</sup> Wash. Admin. Code §§ 468.34.130 and 468.34.150. See Appendix 10.

guidelines specify that utilities should be located outside Control Zones, defined as the roadside area within the highway right-of-way in which placement of utility objects is controlled, unless a variance applies.<sup>64</sup> A variance applies when it is impractical to comply with the maximum Control Zone. For example, compliance is impractical when right-of-way is not adequate to accommodate utility objects outside the Control Zone. Washington has accommodated fiber optic facilities under specified terms and conditions, but they have not traditionally permitted longitudinal installations of below-grade oil and gas pipelines. Should WSDOT wish to implement the proposed 500 foot wide corridor, it may be necessary to revise guidelines that limit installation of oil and gas under highway rights-of-way.

## **Conclusion**

The WCC is a unique project that combines multiple modes of transportation and utilities. Analysis of similar projects and research into Washington and federal law suggests that the WCC is feasible from a legal perspective, but will require new state legislation.

Because the WCC will run through several jurisdictions and involve numerous entities, we recommend that a state-created single purpose entity as the institutional structure that will best facilitate the assembly, master planning, construction and management of the WCC. The legislature should create the entity and provide for the composition of the Board of Directors, including the number of members and the way in which they are selected. The legislature should grant the Entity the necessary powers and authorities it needs to be effective. This includes acting as lead agency for environmental review under NEPA and SEPA. However, its powers and authority should be limited to the WCC.

Because of limited public funding, public-private partnerships are critical to developing the WCC. Public-private partnerships will allow the WCC to benefit from private sector innovations and the fair allocation and management of risk. Washington has a limited public-private authorization statute but the legislature will need to pass legislation that will grant this authorization to the single purpose entity and cure shortcomings of the existing statute.

Finally, the ultimate width and alignment of the WCC will warrant further investigation as to whether there is a need to revise WSDOT guidelines that limit the installation of oil and gas utilities under highway rights-of-way.

---

<sup>64</sup> WSDOT, Utilities Accommodation Policy, M22-86, 3-7 (May 1992).